(8)

No. 95-1521

In the Supreme Court of the United States

OCTOBER TERM, 1996

UNITED STATES DEPARTMENT OF STATE, BUREAU OF CONSULAR AFFAIRS, ET AL., PETITIONERS

v.

LEGAL ASSISTANCE FOR VIETNAMESE ASYLUM SEEKERS, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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1. Respondents argued below and in their merits brief in this Court that the consular venue policy they challenge unlawfully discriminates in the "issuance" of visas on the basis of "nationality," in violation of 8 U.S.C. 1152(a)(1). See Resp. Br. 16-22. As we explain in our opening brief (Gov't Br. 40-49), that argument was wrong even under the law as it stood at the time. Section 1152(a)(1) applies to substantive determinations regarding the granting or denial of immigrant visas, not procedural matters such as the location at which visa applications will be accepted and processed. The latter subject is separately governed by 8 U.S.C. 1202(a), which provides that an alien seeking a visa "shall make application

therefor in such form and manner and at such place as shall be by regulation prescribed." Moreover, the challenged venue policy applies to particular Vietnamese migrants in Hong Kong not because of their nationality, but because of their status under the Comprehensive Plan of Action (CPA), an international agreement that respondents do not challenge. Cf. *Rostker* v. *Goldberg*, 453 U.S. 57, 76-79 (1981); *Personnel Administrator* v. *Feeney*, 442 U.S. 256, 275-281 (1979).

Whatever merit respondents' claim under 8 U.S.C. 1152(a)(1) might once have had, however, it has now been eliminated by recent legislation. On September 30, 1996, the President signed into law the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRA) (enacted as Division C of the Department of Defense Appropriations Act, 1997, Pub. L. No. 104-208, 110 Stat. 3009). Section 633 of the IIRA amends the Immigration and Nationality Act (INA) by adding the following provision to 8 U.S.C. 1152(a)(1):

> (B) Nothing in this paragraph shall be construed to limit the authority of the Secretary of State to determine the procedures for the processing of immigrant visa applications or the locations where such applications will be processed.

See 142 Cong. Rec. H11,827 (daily ed. Sept. 28, 1996).

There can be no doubt that the amendment to 8 U.S.C. 1152(a)(1) governs the disposition of this case. Respondents seek prospective injunctive relief requiring the State Department to process the visa applications of screened-out migrants in Hong Kong. In a case seeking prospective relief, a court is to apply the law in effect at the time of its decision. *Landgraf* v. *USI Film Products*, 511 U.S. 244, 273-274 (1994). An injunction entered under prior law cannot remain in effect. *Pennsylvania* v. *Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421 (1885); *Mount Graham Coalition* v. *Thomas*, 89 F.3d 554, 556-557 (9th Cir. 1996). That rule is especially sound here, because the legislative history shows that the amendment was intended not to change the law, but rather to "clarify" that 8 U.S.C. 1152(a)(1) does not apply to the Secretary's consular venue determinations. H.R. Conf. Rep. No. 828, 104th Cong., 2d Sess. 248 (1996) (142 Cong. Rec. H10,906 (daily ed. Sept. 24, 1996)) (quoted at page 5, *infra*); S. Rep. No. 249, 104th Cong., 2d Sess. 19 (1996); H.R. Rep. No. 469, 104th Cong., 2d Sess. Pt. 1, at 270 (1996). The legislative history further shows that the amendment was enacted with the understanding that it would govern this very case and "would have the immediate effect of forcing several dozen Vietnamese nationals who are family members of United States citizens to return to Vietnam to have their visas processed." 142 Cong. Rec. H11,068 (daily ed. Sept. 25, 1996) (Rep. Conyers); see also *id.* at H11,066 (Rep. Smith); 141 Cong. Rec. S6105 (daily ed. May 3, 1995) (section-by-section analysis of bill proposed by Administration containing provision ultimately enacted as § 633 of IIRA).

The recent amendment makes clear that respondents' statutory claim based on 8 U.S.C. 1152(a)(1) is no longer available. That claim was the sole ground for the court of appeals' judgment in favor of respondents. See Pet. App. 8a-12a. Respondents also present two alternative grounds for affirmance, however: first, that the visa venue policy is arbitrary and capricious within the meaning of the Administrative Procedure Act (APA), 5 U.S.C. 706(2)(A) (Resp. Br. 36-38); and second, that it violates the equal protection component of the Fifth Amendment's Due Process Clause (Resp. Br. 25-36). The district court rejected those claims as "meritless," Pet. App. 27a n.3, but the court of appeals had no occasion to address them. As we

explain below, respondents' APA and constitutional claims are indeed meritless, and the recent amendment of 8 U.S.C. 1152(a)(1) reinforces that conclusion. But because the court of appeals did not address those issues, and because its decision was based solely on a reading of the INA that is now foreclosed, we suggest that the Court vacate the judgment below and remand the case to the court of appeals for further consideration in light of the intervening legislation. See *INS* v. *Elramly*, No. 95-939 (Sept. 16, 1996); *Bureau of Economic Analysis* v. *Long*, 454 U.S. 934 (1981).

2. a. The court of appeals concluded that the U.S. citizens who filed immigrant visa petitions on behalf of migrants in Hong Kong had a right of judicial review under the APA to challenge the consular venue policy as unlawful under 8 U.S.C. 1152(a)(1), since (in the court's view) the visa petitioners were within the zone of interests protected by the general family unification purposes of the INA. See Pet. App. 5a-6a; but see Gov't Br. 35 n.25. The court did not address the further questions of whether judicial review of that claim is nevertheless precluded by the INA (see 5 U.S.C. 701(a)(1)), and whether consular venue determinations are committed to agency discretion by law (see 5 U.S.C. 701(a)(2)). Nor did the court below consider in any respect whether respondents have a right to judicial review under the APA of their remaining non-constitutional claim—namely, that the visa venue policy is arbitrary and capricious within the meaning of 5 U.S.C. 706(2)(A). That threshold reviewability issue is especially significant now, for the legislative history of the recent amendment confirms that consular venue matters are committed to the unreviewable discretion of the Secretary of State. The Conference Report on the IIRA states:

> Section 633—House section 803(a) recedes to Senate amendment 172. This section amends INA section 202(a)(1) [8 U.S.C. 1152(a)(1)] to clarify that the Secretary of State *has non-reviewable authority* to establish procedures for the processing of immigrant visa applications and the locations where visas will be processed.

H.R. Conf. Rep. No. 828, *supra*, at 248 (emphasis added); accord H.R. Rep. No. 469, *supra*, Pt. 1, at 270. That determination by Congress is consistent with the fact that consular matters have been "traditionally regarded as committed to agency discretion," *Lincoln* v. *Vigil*, 508 U.S. 182, 192 (1993), and that 8 U.S.C. 1202(a), which governs consular venue, provides no standards on which judicial review could be based.

b. Quite aside from Congress's recent confirmation of the point, however, it is clear that respondents have no right of judicial review. Respondents acknowledge that, under the doctrine of consular nonreviewability, an alien residing abroad has no right under the APA to judicial review of a consular decision to deny a visa. Resp. Br. 21, 44. But they contend that the consular nonreviewability doctrine has no applicability here because this case does not challenge a decision by a consular officer regarding a particular visa application. That argument fails to take into account the *foundation* of the doctrine of consular nonreviewability. That doctrine is not rooted solely in the preclusion of review under the INA itself, a comprehensive statutory scheme that allows for judicial review of actions concerning the admission of an alien to the United States only if the alien has arrived at our borders. See Gov't Br. 25-30. The doctrine is also rooted in the very nature of visa determinations, which constitute the exercise of the government's fundamentally political power to decide

whether, and under what circumstances, aliens residing abroad may be allowed to enter the country—or, as in this case, to receive permission (in the form of a visa) to travel to this country to seek admission. See Gov't Br. 22-23 & nn. 13, 14. As we have explained (Gov't Br. 19-25), the presumption in favor of judicial review under the APA does not operate in this context, or at least has been rebutted because of the subject matter at issue.

Accordingly, this case is not analogous to *McNary* v. *Haitian Refugee Center, Inc.*, 498 U.S. 479 (1991) (see Resp. Br. 46). There, the Court held that the preclusion of judicial review in 8 U.S.C. 1160(e)(1) for the special agricultural worker program did not apply to collateral challenges to procedures governing applications for adjustment of status, but only to determinations concerning the adjustment of status of individual aliens, which could be challenged only on judicial review of a final order of deportation under 8 U.S.C. 1105a. *McNary* involved aliens residing in the United States, who have traditionally had access to judicial review of matters affecting their deportation (whether by habeas corpus, APA review, or the special mode of review in 8 U.S.C. 1105a). The presumption of judicial review therefore was operative, and the Court allowed a collateral challenge to procedures of general applicability outside of 8 U.S.C. 1105a only because it found that channel inadequate for resolving such a claim. The question was whether that approach was foreclosed by specific language in 8 U.S.C. 1160(e)(1), and the Court, applying the presumption in favor of judicial review, held that it was not. 498 U.S. at 491-498; see also Pet. Br. 34 (discussing *Bowen* v. *Michigan Academy of Family Physicians*, 476 U.S. 667 (1985)). By contrast, aliens abroad have long been denied judicial review of administrative actions affecting their admission to the United States. See *Brownell* v. *Tom We Shung*,

352 U.S. 180, 184 n.3 (1956). It is irrelevant for purposes of that rule whether the alien challenges an individual determination by a consular officer or a rule of more general applicability that informed the consular officer's decision.

Respondents contend (Resp. Br. 40-41) that courts have entertained challenges to administrative actions brought by non-resident aliens under the APA. With a few exceptions, however, the cases cited by respondents either did not involve challenges by aliens residing abroad to decisions affecting their exclusion,[1] or did not directly address the issue presented here.[2] Of the three remaining cases,

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[1] *Reno* v. *Catholic Social Services, Inc.*, 509 U.S. 43 (1993); *McNary* v. *Haitian Refugee Center, Inc.*, 498 U.S. 479 (1991); *Jean* v. *Nelson*, 472 U.S. 846 (1985); *Brownell* v. *Tom We Shung*, 352 U.S. 180 (1956); *Shaughnessy* v. *Pedreiro*, 349 U.S. 48 (1955); *Kwock Jan Fat* v. *White*, 253 U.S. 454 (1920); and *Geigow* v. *Uhl*, 239 U.S. 3 (1915), all involved aliens who had reached the United States. *Constructores Civiles de Centroamerica, S.A. (Conica)* v. *Hannah*, 459 F.2d 1183 (D.C. Cir. 1972), involved a challenge by a foreign company to a government agency's contracting decision. *DKT Memorial Fund, Ltd.* v. *AID*, 887 F.2d 275 (D.C. Cir. 1989), involved a challenge by domestic and foreign organizations to government grant policies. *People of Saipan* v. *United States Dep't of Interior*, 356 F. Supp. 645 (D. Haw. 1973), aff'd, 502 F.2d 90 (9th Cir. 1974), cert. denied, 420 U.S. 1003 (1975), addressed the standing of residents of the Trust Territory of the Pacific Islands to challenge agency action under the National Environmental Policy Act.

[2] In *Silva* v. *Bell*, 605 F.2d 978 (7th Cir. 1979), the court concluded that aliens residing abroad had Article III standing to challenge the allocation of immigrant visas, but it did not directly address the issue of APA review. In addition, the court's decision to allow prudential standing rested on the fact that the class included aliens in the United States. 605 F.2d at 984. *De Avila* v. *Civiletti*, 643 F.2d 471 (7th Cir. 1981), did not address standing or APA review, and the government pre-vailed on the merits in any event. *Allende* v. *Shultz*, 845 F.2d 1111 (1st Cir. 1988), which was similar to *Kleindienst* v. *Mandel*, 408 U.S. 753 (1972), involved a challenge by United States citizens to the denial of an immigrant visa to an alien residing abroad; the court noted that

one, *Estrada* v. *Ahrens*, 296 F.2d 690 (5th Cir. 1961), arose on quite different facts involving an alien who (unlike the migrants in Hong Kong) had previously been in the United States; it did not involve consular venue, and the court did not consider the significance of Congress's then-recent overruling of this Court's *Tom We Shung* decision. See Gov't Br. 25-28. A second, *Mulligan* v. *Shultz*, 848 F.2d 655 (5th Cir. 1988), likewise did not involve consular

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the alien herself had no standing to raise a constitutional claim (845 F.2d at 1114 n.4). *International Union of Bricklayers & Allied Craftsmen* v. *Meese*, 761 F.2d 798 (D.C. Cir. 1985), involved a challenge brought by U.S. citizens to INS guidelines that allowed certain aliens to obtain Department of Labor certifications (and, subsequently, nonimmigrant visas) to work in the United States. The court there concluded that APA review was not precluded by the doctrine of consular nonreviewability, since the plaintiffs were not challenging a determination in a particular case of matters that Congress left to executive discretion. *Id.* at 801. We believe that reasoning is incorrect to the extent it suggests that nonreviewability is limited to decisions denying individual visa applications, but we note that the plaintiffs there could point to a specific provision of the INA arguably giving them an interest in the labor-certification process that was, in turn, cognizable under the APA. See *ibid.*; 8 U.S.C. 1182(a)(14) (1982).

As respondents point out (Resp. Br. 38), the government made a nonreviewability argument in *Sale* v. *Haitian Centers Council, Inc.*, 509 U.S. 155 (1993). The Court did not address the question in its decision, but that hardly means that the Court held that APA review is generally available. Since the Court ruled in the government's favor on the merits, it may have chosen to assume, for the purpose of deciding the case, that the respondents could obtain review under the APA. Cf. *Air Courier Conference of America* v. *American Postal Workers Union*, 498 U.S. 517, 523 n.3 (1991). Furthermore, the respondents in *Sale* argued that the consular nonreviewability doctrine did not apply because the aliens there were seeking not to gain entry into the United States, but to prevent their forced return to Haiti, and that therefore the case did not involve considerations relevant to admission or exclusion. See Gov't Reply Br. at 3-4, Resp. Br. at 53-56, in *Sale* v. *Haitian Centers Council, Inc.*, 509 U.S. 155 (1993) (No. 92-344).

venue; it contains little reasoning, and, we submit, its ruling on APA review was incorrect.[3] And the third, *Haitian Centers Council, Inc.* v. *Sale*, 823 F. Supp. 1028 (E.D.N.Y. 1993), was subsequently vacated by the district court on the parties' stipulation.[4]

Rusk v. *Cort*, 369 U.S. 367 (1962), also does not suggest that aliens residing abroad may challenge consular venue policies under the APA. The Court found that the review provisions made available under the INA to natives living abroad who wished to challenge adverse citizenship determinations were optional, and were not intended to deny remedies that existed prior to enactment of the INA. *Ibid.* The Court also reached its conclusion in light of the serious constitutional questions that would be presented by a contrary ruling. See *id.* at 370; *id.* at 380-383 (Brennan, J., concurring) (noting that a contrary decision would mean that a person previously deemed to be an American citizen "may by unreviewable administrative action be relegated to the status of an alien"). Those factors are not present here. Prior to enactment of the INA, there was no right to judicial review of visa or other immigration matters at the behest of aliens abroad, see *Tom We Shung*, 352 U.S. at 184 n.3, 185 n.6, and no constitutional concern is raised by

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[3] The government prevailed on the merits in *Mulligan* and accordingly had no opportunity for further review of the APA issue.

[4] See *Cuban American Bar Ass'n* v. *Christopher*, 43 F.3d 1412, 1424 (11th Cir.) (discussing the vacatur), cert. denied, 115 S. Ct. 2578 and 116 S. Ct. 299 (1995). The Eleventh Circuit considered the same issue of APA review in *Cuban American Bar Ass'n*, 43 F.3d at 1428, and *Haitian Refugee Center, Inc.* v. *Baker*, 953 F.2d 1498, 1505-1507, cert. denied, 502 U.S. 1122 (1992), and concluded that aliens outside the United States challenging administrative action governing their "screening" as refugees had no right of review under the APA.

such a bar. See, *e.g.*, *Carlson* v. *Landon*, 342 U.S. 524, 537 (1952).[5]

The recent amendments to the INA made by the IIRA manifest neither any relaxation of limitations on judicial review generally, nor any departure from the established rule that aliens abroad who are seeking admission to the United States have no right of judicial review. To the contrary, those amendments provide for further restrictions on administrative and judicial review even for aliens who have reached our shores and seek admission (see IIRA § 302(a) (adding 8 U.S.C. 1225(b)(1)(A)(iii)); IIRA § 306(a) (adding 8 U.S.C. 1252(a)(2)), and they expedite judicial review of all orders of removal by providing for such review directly in the courts of appeals, rather than by habeas corpus in the district courts in exclusion cases (see IIRA § 306(a) (adding 8 U.S.C. 1252(a)(1)). See also IIRA § 381 (restricting jurisdiction under 8 U.S.C. 1329 by excluding suits against federal officials). Moreover, as explained above (see pages 4-5, *supra*), the House and

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[5] Respondents also invoke (Resp. Br. 45) Justice Scalia's separate opinion in *INS* v. *Doherty*, 502 U.S. 314, 330 (1992), which noted that the standard of review of deportation orders formerly applied in actions under the APA is still applicable under 8 U.S.C. 1105a(a). But that opinion also noted that the APA itself provides that the proper proceeding is, presumptively, "the special statutory review proceeding relevant to the subject matter in a court specified by statute" (see 5 U.S.C. 703)—in the case of deportation orders, review under 8 U.S.C. 1105a(a). See 502 U.S. at 330 n.1. Justice Scalia's opinion does not discuss review of exclusion decisions, which, even for aliens in the United States, has been available only through habeas corpus, not the APA. See Gov't Br. 27. Nor does it suggest that aliens abroad, who cannot even seek habeas corpus review, have access to judicial review of immigration matters under the APA. And it certainly does not provide support for the proposition that, if the INA precludes review, or the subject is (like consular venue) committed to agency discretion, judicial review may nonetheless be had under the APA.

Conference Reports on the IIRA make clear that visa venue determinations in particular are "non-reviewable."

c. Even if judicial review were available, there is no substance to respondents' contention (see Resp. Br. 36-38) that the consular venue policy they challenge is arbitrary and capricious. The State Department's definitive policy, effective November 1, 1994, was adopted only after "[a] careful review." J.A. 218. The Department contemporaneously noted that there were "clear indications that our accepting these immigrant visa cases outside Vietnam is one of the factors discouraging screened-out asylum seekers from agreeing to repatriation, and thus seriously undermines the Comprehensive Plan of Action." J.A. 219.[6] The State Department, of course, previously had a different view, but the APA does not prohibit agencies from reexamining their policies. See *Smiley* v. *Citibank (South Dakota) N.A.*, 116 S. Ct. 1730, 1734 (1996).

The Department changed its consular venue policy after receiving "expressions of concern from UNHCR and first asylum countries" that the process of voluntary repatriation would be "cripple[d]" by "taking even a limited number of screened out Vietnamese as immigrants" directly from Hong Kong. J.A. 129. In addition, by 1994, the

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[6] Respondents argue (Resp. Br. 36) that there was not an adequate explanation of the Department's change in policy in April 1993. Whatever may have been the case with respect to that change, the policy under challenge now was adopted on November 1, 1994. The current policy was adopted only after the Department temporarily resumed the processing of screened-out migrants' visa applications in Hong Kong, and again found such processing detrimental. See Gov't Br. 8 n.6. The cable announcing the current policy explained that "the practice of processing applications" from screened-out migrants in Hong Kong "was having an adverse effect on U.S. foreign policy concerns in Asia." J.A. 219; see also 5 U.S.C. 553(a) (exempting foreign affairs functions from APA rulemaking requirements).

Department had concluded that "conditions in Vietnam [had] improved considerably." J.A. 197; see also J.A. 107, 130-132 (affidavits noting that, in 1990, there were "continuing uncertainties as to emigration out of Vietnam," but that, by 1994, the Orderly Departure Program (ODP) in Vietnam had become quite effective).[7] It was surely within the Department's purview to conclude, based on a thorough policy review, that the apparent possibility of immigration to the United States—realistic or not—could influence the screened-out migrants' attitude toward voluntary repatriation, and thus could undermine the complex arrangements embodied in the CPA. See J.A. 129, 219.[8] At the very least, the considered judgment on these matters by the executive officials charged with the

[7] In advocating the former policy, respondents principally rely (Resp. Br. 36-37) on a 1990 cable from the State Department to the U.S. consulate in Hong Kong setting forth the Department's policy at that time. See J.A. 114-117. But the cable elsewhere made clear that the former policy was based on a judgment that "[t]he uncertainties of emigration from Vietnam are still sufficient to make us wary of promoting a policy which would require return of currently eligible immigrants to that country for processing." J.A. 116. "Nevertheless," the cable continued, the "Department recognizes the desirability of a regime where all Vietnamese IV's [immigrant visa applicants] would be processed through ODP, and we will keep the matter under periodic review." *Ibid.* The current policy that respondents challenge was based on precisely such a review.

[8] The class of screened-out migrants in Hong Kong who might seek to apply for an immigrant visa to the United States is not closed. Even if a screened-out migrant were not today eligible to apply for such a visa, he might tomorrow become the beneficiary of an immigration preference by marrying a U.S. citizen or permanent resident, or as the result of an employment-based petition filed by an American employer-sponsor. Thus, as a result of the court of appeals' decision, even migrants not currently eligible for a preference may be less likely to volunteer to return to Vietnam, due to the prospect of processing immigrant visa applications in Hong Kong in the future.

conduct of the Nation's foreign policy cannot be set aside by a court as arbitrary and capricious—especially since Congress, having had the policy brought to its attention, has just responded by removing any statutory obstacle to its effectuation.

3. a. Finally, respondents argue that the visa venue policy at issue in this case must be subjected to strict scrutiny and is unconstitutional under the equal protection component of the Fifth Amendment's Due Process Clause because it distinguishes among aliens on the basis of nationality. See Resp. Br. 25-36. Respondents acknowledge (Resp. Br. 26), however, that the aliens in Hong Kong themselves have no constitutional claim with respect to the visa venue policy. See *Landon* v. *Plasencia*, 459 U.S. 21, 32 (1982) ("an alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application, for the power to admit or exclude aliens is a sovereign prerogative"). Indeed, the Court has been "emphatic" in "reject[ing] the claim that aliens are entitled to Fifth Amendment rights outside the sovereign territory of the United States." *United States* v. *Verdugo-Urquidez*, 494 U.S. 259, 269 (1990) (discussing *Johnson* v. *Eisentrager*, 339 U.S. 763, 784 (1950)); see also 494 U.S. at 271, 273.

Nor does the visa venue policy violate any constitutional rights of the U.S. relatives of migrants in Hong Kong. The policy does not depend at all on the nationality, national origin, or any other attribute of an individual or employer who might have filed a visa petition with the INS.[9] It depends solely on the alien's own status under the

[9] Respondents assert (Resp. Br. 27) that a sponsoring U.S. citizen typically has the same national origin as the alien family member. We may assume for present purposes that that is so as an empirical matter, but nothing in the INA *requires* that their national origin be

CPA, and it applies irrespective of whether the alien seeks an immigrant visa based on his or her relation to a U.S. citizen or permanent resident alien, or on some other qualifying ground—*e.g.*, based on an employment preference,[10] or in the "diversity lottery" for immigrant visas. See 8 U.S.C. 1151(a)(2) and (3). Compare *Fiallo* v. *Bell*, 430 U.S. 787 (1977) (rejecting equal protection challenge even where alien's eligibility depended on illegitimate status or gender of U.S. citizen relative). For that reason alone, there is no basis for the respondents in the United States who filed visa petitions to claim any violation of their own equal protection rights.

b. Respondents acknowledge that they would have no constitutional claim if the consular venue policy had been authorized by Congress, in light of Congress's plenary power over the admission of aliens. See Resp. Br. 29-31. Respondents therefore cannot deny that their constitutional argument, even on its own terms, has been substantially undermined by the IIRA. By clarifying that 8 U.S.C. 1152(a)(1)'s prohibition against discrimination on the basis of nationality does not apply to the Secretary's establishment of procedures and locations for the processing of immigrant visas, Congress has now specifically conferred on the Secretary broad (indeed, unreviewable) discretion to make distinctions on the basis of nationality in consular venue matters. Accordingly, putting to one side that the aliens in Hong Kong have no rights under the Fifth Amendment with respect to their admission and that the visa venue policy has no relation to any personal attributes of their U.S. sponsors, respondents' constitutional argument must fail.

c. There is in any event no support for respondents' contention that the level of constitutional scrutiny should be higher where the Secretary of State acts under delegated authority, rather than pursuant to an express mandate or authorization from Congress. The Executive Branch must, of course, faithfully execute the immigration laws enacted by Congress, and—with respect to aliens who have entered the United States—it must afford aliens procedural due process in doing so.[11] But this Court has never suggested that the Constitution itself prohibits the Executive Branch from taking nationality into account in making decisions about aliens residing abroad, much less that such decisions should be subjected to strict scrutiny. Indeed, the Court's decisions point in the other direction, towards establishing that "[d]istinctions on the basis of nationality may be drawn in the immigration field by the Congress *or the Executive*" for legitimate immigration or foreign-policy reasons. See *Narenji* v. *Civiletti*, 617 F.2d 745, 747 (D.C. Cir. 1979) (emphasis added), cert. denied, 446 U.S. 957 (1980); accord Pet. App. 9a-10a (discussing *Narenji*).

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the same. And there certainly is no basis for suggesting that the visa venue rule applicable to screened-out migrants in Hong Kong was adopted because of the national origin of any of their sponsors in the United States. *Personnel Administrator* v. *Feeney*, 442 U.S. 256, 279 (1979); compare *Wisconsin* v. *City of New York*, 116 S. Ct. 1091, 1100 n.8 (1996).

[10] An alien may be eligible for an immigration preference based on his or her profession, skills, or other work, without regard to the national origin of the employer sponsoring the admission. See 8 U.S.C. 1153(b), 1154(a)(1)(D). In the companion *Lisa Le* case, at least one of the plaintiffs has sought an employment-based immigration preference as a special religious worker. See *Lisa Le* C.A. App. 399G, ¶¶ 26-27 (lodged with the Clerk at the petition stage).

[11] See *Landon* v. *Plasencia*, 459 U.S. at 32; *Galvan* v. *Press*, 347 U.S. 522, 531 (1954); *Wong Yang Sung* v. *McGrath*, 339 U.S. 33, 49-50 (1950); *The Japanese Immigrant Case*, 189 U.S. 86, 101 (1903).

The Court in *United States ex rel. Knauff* v. *Shaughnessy*, 338 U.S. 537, 542-543 (1950), clearly expressed the view that decisions with regard to the admission of aliens residing abroad implicate inherently executive as well as legislative powers, and that judicial scrutiny of executive actions with regard to excludable aliens is therefore inappropriate except as expressly authorized by Congress. Subsequently, in *Kleindienst* v. *Mandel*, 408 U.S. 753 (1972), the Court rejected an argument similar to the one advanced here. There, United States citizens sponsoring an alien scholar for a nonimmigrant visa conceded that, if Congress had enacted a blanket prohibition against the admission of aliens advocating communism, the citizens' First Amendment rights could not override that legislative decision. *Id.* at 767. They contended, however, that because Congress had granted the Attorney General discretion to waive that basis for exclusion, the Attorney General's justification would have to be balanced against the First Amendment rights of the sponsoring citizens. *Id.* at 767-768; cf. Resp. Br. 35-36. The Court held to the contrary, stating that "when the Executive exercises [its discretionary] power negatively on the basis of a facially legitimate and bona fide reason, the courts will neither look behind the exercise of that discretion, nor test it by balancing its justification against the First Amendment interests of those who seek personal communication with the applicant." 408 U.S. at 770.[12]

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[12] In *Jean* v. *Nelson*, 472 U.S. 846 (1985), which involved the parole of excludable aliens who were detained in the United States, the Court concluded that the relevant INA provision and regulation did not permit low-level immigration officials to make individual parole release decisions based on race or national origin. 472 U.S. at 855. But the Court did not suggest that immigration-related policy decisions made by the Executive Branch taking nationality into account are subject to strict scrutiny, especially where, as here, the aliens are

Kent v. *Dulles*, 357 U.S. 116 (1958), suggests nothing to the contrary. In that case, the Court held that Congress had not delegated to the Secretary of State the authority to deny a passport to a United States *citizen* on the basis of affiliation with the Communist Party. The Court noted

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outside the United States. The government in fact argued in its brief in *Jean* v. *Nelson* (at 52) that, even in the context of aliens detained in the United States, nationality may be taken into account if there is a rational basis for doing so. See *Jean* v. *Nelson*, 727 F.2d 957, 978 n.30 (11th Cir. 1989) (en banc) (quoting *Narenji*, 617 F.2d at 747), aff'd on other grounds, 472 U.S. 846 (1985); see also *Fiallo* v. *Bell*, 430 U.S. at 793; *Mathews* v. *Diaz*, 426 U.S. 67, 81-82 (1976). The admission of aliens is committed to the political Branches because it is "vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations," see, *e.g.*, *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 588-589 (1952), and foreign relations fundamentally require dealing with distinct nations. Just as the conduct of foreign affairs under the Constitution unquestionably permits the United States to treat different foreign countries differently, it permits the United States to treat the nationals of those countries differently. Such distinctions based on *nationality* cannot be equated for constitutional purposes with discrimination on the basis of *national origin* in domestic affairs unrelated to immigration or foreign affairs. Cf. *Espinoza* v. *Farah Mfg. Co.*, 414 U.S. 86 (1973).

Even Justice Marshall's dissent in *Jean* v. *Nelson* acknowledged that "the Executive enjoys wide discretion over immigration decisions." 472 U.S. at 880. Although Justice Marshall would have held that aliens detained at the border had rights under the equal protection component of the Fifth Amendment, he noted that the case did not involve "entry decisions," in which "the Government's interest in protecting our sovereignty is at its strongest and * * * individual claims to constitutional entitlement are the least compelling." 472 U.S. at 875. He also suggested that the Government would have a "strong case" if it showed that its policy was "sufficiently related" to a "legitimate governmental goal," such as "slow[ing] down the flow onto United States shores of undocumented Haitians." *Id.* at 880-881; compare *Sale* v. *Haitian Centers Council, Inc.*, 509 U.S. 155, 163-164, 187-188 (1993).

that, since a constitutional right to travel abroad was implicated, constitutional concerns would be raised by construing the statute to afford the Secretary that authority. *Id.* at 127-129. The Court did not hold, however, that the level of constitutional scrutiny was more strict simply because the decision had been made by the Executive rather than Congress (see Resp. Br. 32), and indeed it subsequently invalidated an Act of Congress prohibiting the use of United States passports by members of the Communist Party. See *Aptheker* v. *Secretary of State*, 378 U.S. 500 (1964).

d. Respondents assert (Resp. Br. 26, 31) that the challenged visa venue policy impermissibly abridges a statutory right of United States citizens to family reunification. The INA, however, simply does not grant to citizens the right to have their relatives admitted to this country.

To be sure, Congress has created a statutory immigration preference for close relatives of citizens, but the argument that citizens thereby have a right in the admission of their alien relatives has been recognized as a "fallacy." See *Fiallo* v. *Bell*, 430 U.S. 787, 795 n.6 (1977). The cognizable interests of the sponsoring U.S. citizens are no different in nature from those accorded to lawful permanent residents and employers in certain circumstances, and they extend only to having the aliens for whom they have filed a visa petition classified for an immigration preference. Once the Attorney General has determined that the alien seeking admission is eligible for such a preference, the interest of the sponsoring relative or employer comes to an end. Consular officials (and, later, INS officials) then apply the statutory rules of admissibility to determine whether the alien may in fact be permitted to enter the United States; the sponsor has no

legally protected interest in that process.[13] Compare 8 C.F.R. Pt. 204 (Attorney General's regulations for processing of visa *petitions*) with 22 C.F.R. 42.61 to 42.74 (State Department's regulations for processing of visa *applications* by aliens); see also 22 C.F.R. 42.41 ("The approval of a petition does not relieve the alien of the burden of establishing to the satisfaction of the consular officer that the alien is eligible in all respects to receive a visa."). Accordingly, it is settled that a sponsoring citizen, like an alien abroad seeking admission, may not seek judicial review of a consular decision if the alien is denied a visa by consular officials. See Gov't Br. 30 & n. 22.[14]

4. We do not dispute that United States citizens may have an earnest and sincere desire to effectuate the

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[13] In this case, for example, even after the INS approved the visa petition filed by respondent Em Van Vo, a United States citizen, to have his daughter Truc Hoa Thi Vo classified as an alien entitled to an immigration preference, consular officials in Hong Kong denied Ms. Vo a visa because they found insufficient information to conclude that she would not be a public charge. Pet. 10 n.7.

[14] Similarly, a United States citizen has no right to intervene in deportation proceedings against an alien relative, because the citizen has no legally protected right in maintaining the alien's presence in the United States. See *Emciso-Cardozo* v. *INS*, 504 F.2d 1252 (2d Cir. 1975); *Agosto* v. *Boyd*, 443 F.2d 917 (9th Cir. 1971) (per curiam); see also *Garcia* v. *Boldin*, 691 F.2d 1172, 1183 (5th Cir. 1982); *Noel* v. *Chapman*, 508 F.2d 1023, 1027 (2d Cir. 1974).

Oyama v. *California*, 332 U.S. 633 (1948), and *Palmore* v. *Sidoti*, 466 U.S. 429 (1984), relied upon by respondents (Resp. Br. 27), are readily distinguishable. They involved infringements of legally protected interests of the United States citizens themselves—in *Oyama*, the citizen son's state-law right to own property, which was denied because of his own racial descent; and in *Palmore*, the mother's interest in the custody of her minor child, which was denied because of the race of the man she married. Neither case involved aliens abroad who were seeking to be admitted to the United States.

immigration of their relatives abroad. Nor do we dispute that Congress has established a significant substantive preference for such immigration. Nonetheless, it remains true (as this Court has recognized for more than a century) that the circumstances under which aliens may be permitted to immigrate to the United States—and indeed may apply for permission to do so—are fundamentally matters of sovereignty within the control of the political Branches of government. They are not subject to judicial review, except under such conditions as Congress expressly authorizes. Because respondents have failed to show that Congress has authorized judicial review of the consular venue policy challenged in this case, that the policy is invalid under any statutory norm, or that the Constitution itself renders the policy invalid, the decision of the court of appeals cannot stand.

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For the foregoing reasons, the Court should vacate the judgment of the court of appeals and remand the case for further consideration in light of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996. In the alternative, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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